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IN THE

Supreme Court of the United States

OCTOBER TERM—1946

No. 342

DANIEL BIRMELI DINGMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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August 1, 1946

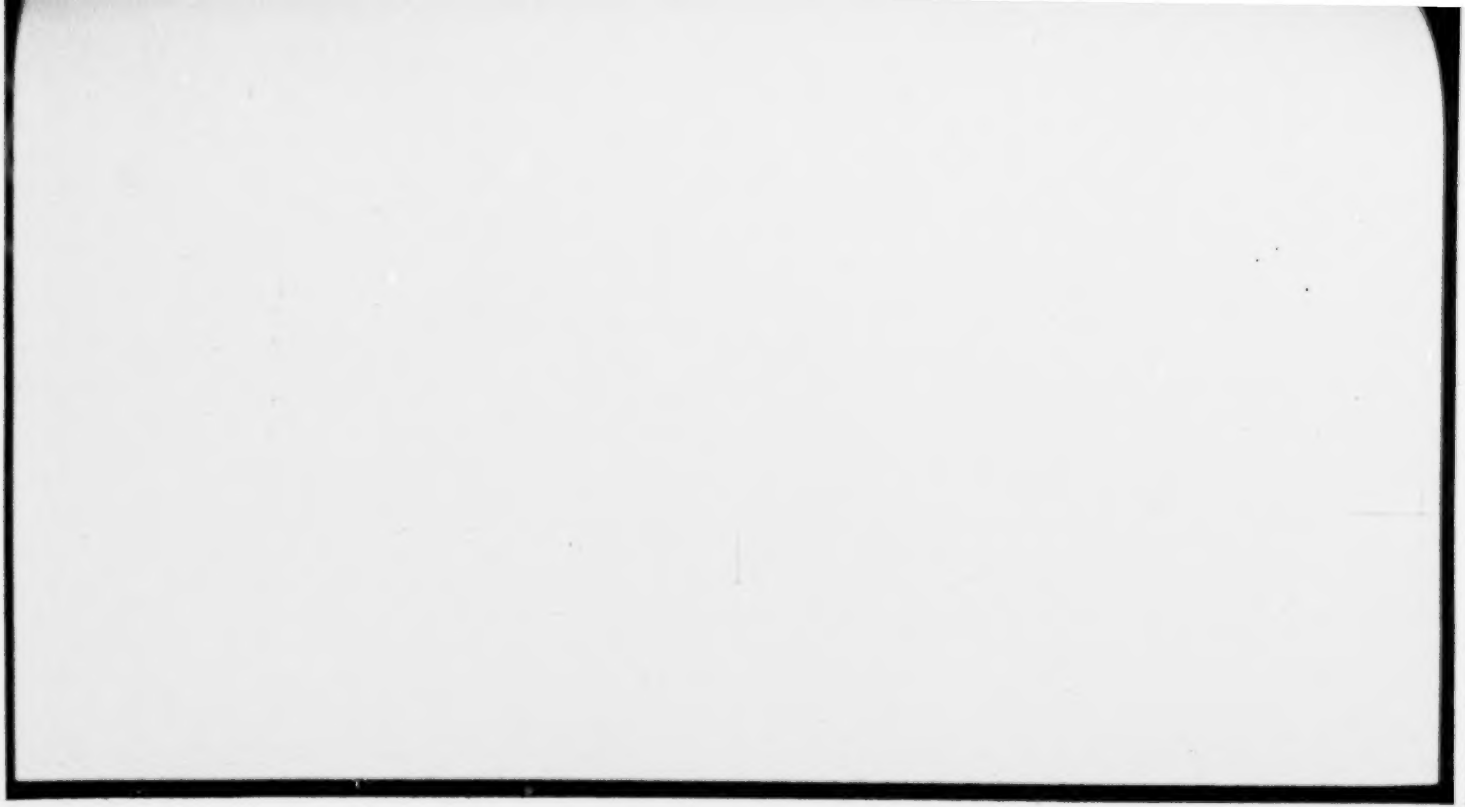


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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Daniel Birmeli Dingman, respectfully petitions for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review the judgment of that court of June 4, 1946, affirming judgment of the District Court of the United States for the Northern District of California, of November 1, 1945, convicting the petitioner for violation of the Selective Training and Service Act of 1940, *as amended,* and sentencing him to a term of three years in a Federal penitentiary.

Jurisdictional Statement

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended (28 U. S. C. Sec.

347(a)), and Rule 37(b) Federal Rules of Criminal Procedure (18 U. S. C., Sec. 687).

Statutes Involved

The relevant parts of Sections 3(a), 3(b) and 5(g) of the Selective Training and Service Act of 1940 (Public Law 783, 1940; 54 Statutes 885; 50 U. S. C. App. Sec. 303(a), (b), 305(g)), (Service Extension Act of 1941 Public Law 213, 1941; 55 Statutes 626; 50 U. S. C. App. Sec. 351, 352), Territorial Use of Army and Extension of Service Act (Public Law 338, 1941; 55 Statutes 799; 50 U. S. C. App. Sec. 731, 732), and Executive Order No. 8862, August 21, 1941 (6 Fed. Register 4319) are set out in Appendix "A" to this petition.

Statement of Matters Involved

Petitioner was indicted in the Northern Division of the Northern District of California for violation of the provisions of the Selective Training and Service Act of 1940, *as amended*. The indictment alleged that petitioner, having been classified IV(E), (i.e. as a conscientious objector, *found conscientiously opposed to participation even in non-combatant service*) and assigned to a Civilian Public Service Camp, No. 148, "for work of national importance", on or about July 22, 1945, "did knowingly, wilfully and feloniously absent himself without authority from said camp." [R. 2, 3] The indictment fails to state when the petitioner had been "assigned to work of national importance."*

*See foot note p. 3 *infra*.

Petitioner, although not an attorney, himself filed and argued a demurrer to the indictment, alleging that the indictment did not state an offense against the United States in several respects, only one of which is here raised. This was that the indictment did not state any such offense "in that the defendant prior to the time of his being transferred to said Civilian Public Service Camp No. 148 had already fulfilled all of the obligations imposed, or reasonably to be inferred from either the language or the intent as having been imposed upon him under the Selective Training and Service Act of 1940, as amended, by reporting as directed by his local Selective Service Board" to numerous designated camps, including Camp No. 148, *"and therein * * * performing the work designated as work of national importance for the full period of one year, which is the maximum period of service that can be inferrerd reasonably from said Act to be required."* [R. 6]

The demurrer was overruled. [R. 10] Petitioner pleaded not guilty to the indictment, was found guilty as charged, and on November 1, 1945, was sentenced to a term of 3 years in a Federal penitentiary. [R. 4, 11, 12]

Petitioner appealed to the Circuit Court of Appeals on the ground, among others, above specified in the demurrer. [R. 15] That court on June 4, 1946, affirmed the judgment of the District Court with an opinion which appears at 24-29 of the record. The Circuit Court of Appeals in affirming the judgment of the District Court assumed, as did the District Court, that petitioner had performed "work of national importance" for more than one year in the civilian public service camps to which he had been assigned.*

---

*That petitioner had in fact performed work of national importance for more than 12 months prior to absenting himself

The Circuit Court of Appeals in its opinion (R. 28) said:

> "The same contention made here was advanced in *Wolfe* v. *U. S.*, 149 F. 2d 391, C. C. A. 6. The Sixth Circuit Court of Appeals, in rejecting the contention and affirming the conviction, stated:
>
> > 'The Act does not limit the service of a conscientious objector in works of national importance to twelve months * * *'.

---

on July 22, 1945, from Camp No. 148, as alleged in the indictment, is shown by Government Exhibits 1 and 2 introduced on his trial in the District Court. These exhibits show that petitioner was assigned to work of national importance in July 1943. While these exhibits were not made part of the record on appeal to the Circuit Court of Appeals they are referred to in that record (R. 11) and certified copies of them have been transmitted to the Clerk of this Court by the Clerk of the District Court.

Moreover, as already noted, the indictment (R. 23) failed to state when the petitioner had been "assigned to work of national importance." In this connection, it is to be noted, that the indictment alleged a violation of the Selective Training and Service Act of 1940 *as amended*, and did not allege a violation of the original Selective Training and Service Act of 1940, *as unamended* by the Extension Acts of August 18, 1941, and December 13, 1941. Presumably this was because the indictment was based on the theory that, although petitioner had been assigned to work of national importance for more than 12 months prior to the alleged offense, the original 12 month period of assignment had been extended by such Extension Acts. The alternative to this construction of the indictment is that otherwise the indictment omitted a material allegation in failing to allege that petitioner at the time of the alleged offense had been assigned to work of national importance *for less than 12 months*. Assuming this latter construction of the indictment is correct, it is possible that, strictly speaking, the demurrer should have specifically pointed out this failure of the indictment to allege a material fact. However, it is to be remembered that the demurrer was prepared by the petitioner, who is not a lawyer, and that, in substance, he did point out this insufficiency of the indictment by alleging in his demurrer that petitioner at the time of the alleged offense had already performed work of national importance for a period of twelve months (R. 6).

> "Time of service for a conscientious objector is not limited to one year. It is for the duration of the war and six months thereafter unless sooner terminated by the Director of Selective Service."

The Court's opinion in this case, however, by using asterisks in quoting from the *Wolfe* case, omitted the significant portion of the opinion of the Sixth Circuit Court of Appeals in that case. In the *Wolfe* case what the Sixth Circuit Court of Appeals really said was, p. 393:

> "The Act does not limit the service of a conscientious objector in works of national importance to twelve months *and nothing in the record indicates that any effort was made to extend his service beyond that period. He makes no pretense that he served for that period.*" (Italics supplied)

Except for the case at bar, the *Wolfe* case is, so far as counsel has been able to determine, the only case in which the question has been raised as to whether the assignment of a conscientious objector to work of national importance is limited to twelve months. The decision of that question, however, was not necessary to the sustaining of the conviction in the *Wolfe* case since, as the Court stated in that case, *supra,*

> "* * * nothing in the record indicates that any effort was made to extend his service beyond that period. He makes no pretense that he served for that period."

The Court in this case, in basing its decision of this question on the mere dictum of the Court in the *Wolfe* case, failed to note the determinative difference between the records of the two cases in this respect—the record in this case showing that petitioner at the time of absenting himself from Camp No. 148 as charged in the indictment *had*

already been assigned to and performed work of national importance for more than twelve months.

It should be noted that on July 3, 1946, Mr. Justice Reed extended the term for filing petition for a writ of certiorari in these proceedings until August 1, 1946.

Question Presented

The question here presented is whether a conscientious objector *assigned to work of national importance,* and *not inducted* either for *combatant* or *non-combatant service,* violated the Selective Training and Service Act of 1940, *as amended,* by absenting himself from a camp to which he had been assigned *after having performed work of national importance for more than 12 months under such assignment.*

The answer to this question depends on whether or not either the Service Extension Act of August 18, 1941, (50 U. S. C. App. Sec. 351, 352) (appendix "A" p. ii) or the Territorial Use of Army and Extension of Service Period Act of December 13, 1941 (50 U. S. C. App. Sec. 731, 732) (appendix "A" p. iii) extended for conscientious objectors, *found conscientiously opposed even to non-combatant service,* the 12-month period of *assignment to work of national importance* provided by the Selective Training and Service Act of 1940, or whether the extensions of service and training provided by such Extension Acts were limited to persons *inducted* into or *subject* to *active military service* and, possibly also, to conscientious objectors *inducted* for *non-combatant* service and training.

The importance of the question presented is not limited to the validity or invalidity of petitioner's conviction. In effect it extends to the validity or invalidity of the present

detention in conscientious objector camps of approximately 3000 conscientious objectors *never inducted into or subject to active military service, or even non-combatant service.*

Reasons for Allowance of Writ

The Circuit Court of Appeals for the Ninth Circuit by its judgment has decided an important question of Federal law which has not been, but should be, settled by this Court (Rule 39(b) of this Court).

Moreover, as already noted, the judgment of the Circuit Court of Appeals for the Ninth Circuit in this case constitutes the first decision of this question by any Circuit Court of Appeals, though as shown *supra* p. 5, such Circuit Court of Appeals erroneously assumed that the question had already been decided by the Circuit Court of Appeals for the Sixth Circuit in the *Wolfe* case, *supra.*

While the question here involved, has already been stated (*supra* pp. 6, 7), it will be repeated here for convenience.

That question is whether a conscientious objector, found to be conscientiously opposed to participation even in non-combatant service, and therefore *"assigned to work of national importance"* and *not inducted* either for *combatant* or *non-combatant service,* violated the Selective Training and Service Act of 1940, *as amended,* by absenting himself from a camp to which he had been assigned *after having performed work of national importance for more than 12 months under such assignment.*

As likewise already stated, (*supra* p. 6) the answer to this question depends on whether or not either the Service Extension Act of August 18, 1941, (50 U.S.C. App. Sec.

352), or the Territorial Use of Army and Extension of Service Period Act of December 13, 1941, (50 U.S.C. App. Sec. 731, 732), extended for conscientious objectors, *found conscientiously opposed even to non-combatant service,* the 12-month period of *assignment to work of national importance* provided by the Selective Training and Service Act of 1940, or whether the extensions of service and training provided by such Extension Acts were limited to persons *inducted* into or *subject* to *active military service* and, possibly, also, to conscientious objectors *inducted* for *non-combatant* service.

In construing the original Selective Service Act of 1940 and the respective Extension Acts of August 18, 1941, and December 13, 1941, it is important to note that the 1940 Act established, so far as concerns the question here involved, three categories for registrants under the draft.

The first category is established by Sec. 3 (a) of that Act (50 U.S.C. App. 303(a)) (appendix "A" p. i) and authorizes the President "to select and *induct into the land and naval forces* of the United States *for training and service,* in the manner provided in this Act, such number of men as in his judgment is required for such forces in the national interest."

The second and third categories are established by Sec. 5 (g) of that Act (50 U.S.C. App. 305(g)) (appendix "A" p. i) and relate to conscientious objectors. The second category relates to those conscientious objectors "claiming such exemption from *combatant training and service* because of such conscientious objection." As to such a conscientious objector, it is provided that he shall, "if he is *inducted* into the land or naval services under this Act, be assigned to *non-combatant service* as defined by the

President * * *." The third category relates to conscientious objectors *"found* to be conscientiously opposed to participation in such non-combatant service". As to such a conscientious objector, it is provided that he shall *"in lieu of such induction, be assigned* to work of national importance *under civilian direction."* (All italics supplied)

In other words, the Act of 1940 provides for the *induction* into *the land and naval forces* of the United States for training and service of those conscientious objectors *not found* to be conscientiously opposed to participation in non-combatant service. It provides, however, that those *found* to be conscientiously opposed even to non-combatant service, *shall not be inducted into such forces,* but, *in lieu thereof,* shall be *assigned* to work of national importance *under civilian direction.*

This distinction it will be seen becomes controlling in connection with the two Extension Acts. Moreover, that it is a real distinction and has been so construed in practice is shown by the fact that conscientious objectors *assigned to work of national importance under civilian direction* have been denied military pay and all other rights and privileges which have been accorded conscientious objectors *inducted into the land and naval forces of the United States* because not found conscientiously opposed to non-combatant service. This latter class of conscientious objectors, *so inducted,* have received the pay of members of the Armed Forces and have been held entitled to the re-employment privileges and insurance applicable to such forces. Furthermore by the express provisions of Sec. 11 of the Act of 1940 (50 U.S.C. Sec. 311) no person *not inducted* may be tried by court martial, unless already subject to such trial by prior laws. (See *Billings* v. *Truesdell* 321 U. S. 542.)

The first Extension Act, that of August 18, 1941, provided:

> "The President is hereby authorized, subject, however, to the conditions hereinafter stated, to extend, for such periods of time as may be necessary in the interests of national defense, the periods of service, training and service, enlistment, appointment, or commission, of any or all persons *inducted* for training and service under said Act * * * and *any other members of the Army*, who are now, or who may hereafter be, in or *subject to active military service*, or training and service: *Provided*, That extension of the periods of *active military service*, or training and service, in the case of any person subject to the provisions of this section, shall not, without his consent, exceed eighteen months in the aggregate; except that whenever the Congress declares that it is in the interests of national defense to further extend such *periods of active military service*, and training and service, such periods may be further extended by the President, *in the case of any such persons*, for such time as may be necessary in the interest of national defense * * *." (50 U.S.C. App. Sec. 352) (italics supplied.)

That the foregoing extension could not authorize the President to extend the periods of service for conscientious objectors not inducted into the Armed Forces, but assigned to work of national importance, seems patent from the very wording of the Act. There is no reference in that Act to this category of conscientious objectors, the Act specifically applying by its terms only to those persons *inducted* into the armed services or *subject to active military service* or training and service.

Moreover, the President's Executive Order No. 8862, of August 21, 1941, which is printed in Appendix "A" to this petition [p. iv] makes no reference to nor does it purport to apply to such conscientious objectors as petitioner. That order by its terms applies only to "persons *inducted for training and service* under the provisions of the Selective Training and Service Act of 1940, as amended."

Furthermore, that the Congress did not intend the first Extension Act to apply to conscientious objectors *not inducted* into the Armed Forces is shown by the express language of the second Extension Act, that of December 13, 1941, which reads as follows:

"The periods of service, training and service, enlistment, appointment, or commission, of *all members of the Army* of the United States, now or hereafter in or *subject to active military service* of the United States, are extended for the period stated in the preceding section: * * *." (50 U. S. C. App. Sec. 732) (appendix p. iii)

Obviously, again, this extension has no application to conscientious objectors of petitioner's category, since neither petitioner nor others of that category have ever been "members of the Army of the United States" or "in or subject to *active military service* of the United States."

Assuming this is so, it follows that Selective Service Regulation 652.14, quoted in the opinion of the Circuit Court of Appeals (R. pp. 27, 28) and which was promulgated December 24, 1941, effective February 1, 1942, following the enactment of the second Extension Act of December 13, 1941, is not authorized either by that Act or by the first Extension Act of August 18, 1941. That Regulation reads as follows:

> "652.14. Period of Service. A registrant in Class IV-E who has been assigned to a camp shall be engaged in work of national importance under civilian direction during the existence of any war in which the United States is engaged and during the six months immediately following the termination of any such war, unless sooner released by the Director of Selective Service." Title 32 Cumulative Supplement to Code of Federal Regulations of the United States)

In this connection it is important to note what was said by the Director of Selective Service, Major-General Lewis B. Hershey, in his report "Selective Service in Peacetime—First Report of the Director of Selective Service—1940-41" (Government Printing Office, 1942). The Director there said, at page 200:

> "In keeping with the original Selective Service Act, it was expected that assignees would serve one year in camp and then be released. However, congressional action extended the term of service for men in the Army. *It was interpreted to apply to assignees as well,* so that their term of duty was increased. . ." (italics supplied)

From the foregoing, it is to be noted that the Director of Selective Service himself recognized that there was no express authority in either of the Extension Acts for his Selective Service Regulation 652.14. Furthermore, it is obvious that such Regulation represented not a valid interpretation of either of the Extension Acts, but an unwarranted assumption of power to extend the assignment of conscientious objectors to work of national importance, without the slightest authority for such extension in the terms of either of those Acts.

It is submitted, therefore, that since at the time petitioner left Civilian Public Service Camp No. 148, as charged in the indictment, he had performed work of national importance for more than the 12-month period specified by the Selective Training and Service Act of 1940, petitioner in so doing committed no offense against the United States, and his conviction, therefore, should be reversed.

Accordingly, petitioner respectively submits that a writ of certiorari should issue, as prayed, to the Circuit Court of the United States for the Ninth Circuit.

Respectfully submitted

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August 1, 1946

APPENDIX A

Selective Service and Training Act of 1940, as amended (54 Statutes 885; 50 U. S. C. App. 303 (a), (b), 305 (g)

"3 (a) Except as otherwise provided in this Act, every male citizen of the United States, and every male person residing in the United States, who is between the ages of eighteen and forty-five at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States. . . .

3 (b) Each man inducted under the provisions of subsection (a) shall serve for a training and service period of twelve consecutive months, unless sooner discharged, except that whenever the Congress has declared that the national interest is imperiled, such twelve-month period may be extended by the President to such time as may be necessary in the interests of national defense.

5 (g) Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction. . . ."

Service Extension Act of 1941

(Public Law 213, 1941, approved Aug. 18, 1941; 55 Statutes 626; 50 U. S. C. App. Sec. 351, 352)

"The Congress, acting in accordance with and solely for the purpose of carrying into effect the provisions of section 3 (b) of the Selective Training and Service Act of 1940 hereby declares that the national interest is imperiled.

Sec. 2. The President is hereby authorized, subject, however, to the condition hereinafter stated, to extend, for such periods of time as may be necessary in the interests of national defense, the periods of service, training and service, enlistment, appointment, or commission, of any or all persons inducted for training and service under said Act, members and units of the reserve components of the Army of the United States (including the National Guard of the United States), retired personnel and enlisted men of the Regular Army, and any other members of the Army, who are now, or who may hereafter be, in or subject to active military service, or training and service: *Provided,* That extension of the periods of active military service, or training and service, in the case of any person subject to the provisions of this section, shall not, without his consent, exceed eighteen months in the aggregate; except that whenever the Congress declares that it is in the interests of national defense to further extend such periods of active military service and training and service, such periods may be further extended by the President, in the case of any such persons, for such time as may be necessary in the interests of national defense: *Provided further,* that the authority hereby conferred is subject to the condition that the delegation of such authority may be revoked at any time by concurrent resolution of the Congress."

TERRITORIAL USE OF ARMY AND EXTENSION OF SERVICE PERIOD

(Public Law 338, 1941, approved December 13, 1941; 55 Statutes 799; 50 U. S. C. App. Sec. 731, 732)

"The provisions of Public Resolution Numbered 96, Seventy-sixth Congress, approved August 27, 1940, as amended, and of Public, Numbered 783, Seventy-Sixth Congress (the Selective Training and Service Act of 1940), as amended, insofar as they restrict the territorial use of units and members of the Army of the United States, are suspended during the existence of any war in which the United States is engaged, and during the six months immediately following the termination of any such war.

Sec. 2. The periods of service, training and service, enlistment, appointment, or commission, of all members of the Army of the United States now or hereafter in or subject to active military service of the United States are extended for the period stated in the preceding section: *Provided,* that nothing in this section shall be construed to prevent the President from terminating such periods of service, training and service, enlistment, appointment, or commission at an earlier date in any case."

EXECUTIVE ORDER NO. 8862, AUGUST 21, 1941

(6 Fed. Register 4319)

"By virtue of the authority conferred upon me by section 2 of the Service Extension Act of 1941 (Public Law 213, 77th Congress, approved August 18, 1941), and as Commander-in-Chief of the Army and Navy of the United States, it is ordered as follows:

1. The periods of training and service of all persons inducted for training and service under the provisions of the Selective Training and Service Act of 1940, as amended, who are now, or who may hereafter be, in such training and service, are hereby extended for a period of 18 months, unless such persons are sooner discharged. . . . ."

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REPLY OF PETITIONER TO BRIEF IN OPPOSITION

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REPLY OF PETITIONER TO BRIEF IN OPPOSITION

The very clear and able brief in opposition would seem to make the strongest possible showing in support of the Government's position that even though petitioner was a conscientious objector *not inducted into the Armed Services* for training and service, *but assigned to work of national importance under civilian direction,* his term of service was, nevertheless, validly extended beyond the twelve month period of assignment provided by Section 3(b) of the Selective Training and Service Act of 1940, under the authority conferred by the Extension of Service Acts of August 18 and December 13, 1941.*

This showing, strong as it is, however, ignores the following considerations which would seem conclusive against the Government's position:

*These Acts are, respectively, the Service Extension Act of August 18, 1941, (50 U. S. C. APP. Sec. 351, 351); and the Territorial Use of Army and Extension of Service Period Act of December 13, 1941 (50 U. S. C. App. Sec. 731, 732). These will be found respectively at pp. ii and iii of Appendix A to the Petition for Cetriorari.

I.

The brief in opposition states, pp. 10-11:

> "Petitioner's argument is thus based upon an untenable distinction between the applicable statutes. If, as he has no difficulty assuming, Section 3 (b) of the original act applied to limit the required service period of conscientious objectors to twelve months, then the two extension acts of 1941 similarly applied and were authority for the promulgation of Regulation 652.14. If, on the other hand, the extension acts are to be read literally, as petitioner urges, so as not to apply to such persons, Section 3 (b) must be similarly construed. In the latter event, there was no controlling legislative provision and the matter was properly one for the determination of the Director of Selective Service acting in accordance with the general policy laid down by Congress."

In this statement the Government overlooks sound reasons for the distinctions made by the petitioner between the Selective Service Act of 1940 and the two Extension Acts of 1941.

First and foremost; had Congress intended that the Extension of Service Acts of August 18 and December 13, 1941, should apply to conscientious objectors not inducted into the Armed Services but assigned to work of national importance, Congress could readily have expressly so provided and, it would be reasonable to assume, would have done so. Such conscientious objectors, however, are not even mentioned in either of those Acts. Moreover, in both those Acts Congress has used meticulously precise language, not only expressly limiting the extension periods provided by

those Acts to person *inducted* into the Armed Services, but even as to such persons, only to those "now or hereafter in or subject *to active military service.*" Obviously, this language necessarily excludes even conscientious objectors *inducted* into the Armed Services, not to speak of those who, like petitioner, were *not so inducted,* but were *merely assigned* to work of national importance.*

Second; while Section 3(b) of the 1940 Act does not in express terms apply to conscientious objectors assigned to work of national importance, it seems necessary to construe that Section as intended so to apply. The alternative would be to assume that the Act was intended to penalize such conscientious objectors by condemning them to indeterminate service, the length of which would be limited only by the will of the President. Such construction of the Act would be not only of doubtful constitutionality, but it would attribute to Congress a vindictive instead of a tolerant and constitutional attitude toward conscientious objectors. It moreover, would conflict with the administrative construction put by the Director of Selective Service on the Act, as shown in his First Report, quoted p. 9 of the Brief in Opposition. There the Director stated:

> "It was felt that assignees should be neither favored, nor punished because of their beliefs, but as far as the law allowed, they should undergo the same inconveniences and receive the same benefits as the men in the Services."

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*The suggestion at page 6 of the petition for certiorari that conscientious objectors *inducted* for non-combatant training and service may possibly be subject to the extension periods provided by the Extension Acts of August 18 and December 13, 1941, seems on further consideration to be unwarranted.

In other words, Section 3(b) cannot be read literally without unreasonable and possibly unconstitutional results. Therefore, even though the language of that Section does not expressly include conscientious objectors not inducted into the Armed Forces, it must be construed as intended to include them, because they are not expressly excluded, and because an intent to exclude them could not reasonably be imputed to Congress unless Congress had used language expressly doing so. On the other hand, the Extension Acts of August 18 and December 13, 1941 can be read literally without unreasonable or unconstitutional results. Congress might very well have come to realize that the vast majority of conscientious objectors were conscientiously opposed even to participation in non-combatant service, and that in reality no work of national importance could or had been found for more than a very small minority of such conscientious objectors. To extend the term of service of such conscientious objectors beyond the twelve month period provided by Section 3(b) of the 1940 Act, therefore, would serve no useful purpose, and would merely result in the unwarranted expense of providing personnel and camps for their continued control and maintenance. Furthermore, it cannot be pretended that the meticulously precise language of the Extension Act expressly includes any conscientious objectors. On the contrary, by its very terms, that language necessarily excludes conscientious objectors of any category. Therefore, there is no reason for not reading such language literally, or for attempting to construe it to include conscientious objectors when, by such precise terms, it necessarily excludes them.

II.

The brief in opposition states, p. 9:

> "It is significant that in several successive sessions after the promulgation of this Regulation (652.14) Congress appropriated funds for the operation and management of the civilian public service camps without questioning its propriety. See, e.g., 50 U. S. C. App., Supp. V, 309a."

While it is notorious that civilian camps for conscientious objectors have been mainly supported by private organizations, largely religious, petitioner assumes the accuracy of the statement that Congress has made some appropriations for the operation and management of such camps. However, even though such appropriations have been made since the promulgation of Selective Service Regulation 652.14, such appropriations have not the signficance the Government would ascribe to them, i.e., that thus Congress gave legislative affirmance to the administrative construction put by the Director of Selective Service on the Extension Acts of August 18 and December 13, 1941, as including conscientious objectors assigned to such camps for work of national importance.

Irrespective of the enactment of such Extension Acts, Congress knew that new conscientious objectors would become subject to assignment to work of national importance for the twelve month period provided by the 1940 Act, since, assuming Congress did not intend such Extension Acts to apply to conscientious objectors, those Acts would not affect the continuing application to them of the provisions of the 1940 Act. Therefore, civilian public service camps would continue to be necessary for such new conscientious objec-

tors, even if assignees who had already served the specified twelve month period were discharged as such period should expire. The fact, therefore, that Congress continued to make appropriations for such camps after the promulgation of Regulation 652.14, carries no necessary or reasonable implication that Congress thereby meant to confirm a construction put by that Regulation on such Extension Acts, contrary to the very precise language which Congress itself had used in those Acts. On the contrary, the reasonable implication is that Congress intended such appropriations for the control and at least partial maintenance of new conscientious objectors assigned to such camps under the provisions of Section 3(b) of the 1940 Act, which provisions Congress obviously has intended should continue to apply to them, because as to them, such provisions were not intended to be changed by the Extension Acts.

III.

At page 11 of the Brief in opposition, it is stated:

> "That policy, as we have already noted, was followed in the promulgation of the Regulation, and it has likewise been followed in respect of the release of conscientious objectors."

Presumably, the policy referred to is that stated in the quotation at page 9 of the brief from the First Report of the Director of Selected Service, which reads as follows:

> "In keeping with the original Selective Service Act, it was expected that assignees would serve one year in camp and then be released. However, congressional action extended the term of service for men in the Army. It was interpreted to apply to as-

> signees as well, so that their term of duty was increased to 18 months. Similarly, when the Army released men over 28 years old, the Camp Operations Division did the same. The general rule has been to follow Army policy in matters of this kind as closely as possible, not because the assignees were considered to have a military status, but with the idea of making the conditions of their service comparable wherever this could be done. It was felt that assignees should be neither favored, nor punished because of their beliefs, but as far as the law allowed, they should undergo the same inconveniences and receive the same benefits as the men in service."

In support of this statement of the Director of Selective Service, it is notable that all the Government is able to instance is what is stated in the footnote to page 11 of the brief in opposition, where it is said:

> The Camp Operations Division of the Selective Service System has adopted a plan for the discharge of men from CPS camps similar to that for the demobilization of Army personnel. This plan has been effectuated by a series of directives to all CPS camps and institutions, the first of which was issued on or about October 18, 1945. Each of these directives sets forth the release procedures and qualifications to be employed and each in turn follows the standards for discharge then prevailing for the Army."

Conceding that, as stated in such footnote, the Selective Service system has adopted a plan and issued a series of directives "for the discharge of men from CPS camps, similar to that for the demobilization of men from the Army personnel", petitioner alleges that it is notorious that such directives have not been followed in practice. However this

may be, it is to be noted that the Government does not undertake to deny the allegations at page 9 of the petition for certiorari, that conscientious objectors assigned to work of national importance under civilian direction have been denied military pay and all other rights and privileges which have been accorded to conscientious objectors actually inducted into the land and naval forces of the United States, who receive the pay of members of the Armed Forces and are accorded the re-employment and insurance provisions accorded such forces.

So far, therefore, as the Government's contention that the Extension Acts of August 18 and December 13, 1941, should be held to apply to conscientious objectors not inducted into the Armed Forces but assigned to work of national importance, rests on the alleged uniform application of other provisions of those Acts both to such conscientious objectors and the Armed Forces, that contention seems plainly to be without basis in fact.

CONCLUSION

Petitioner accordingly respectfully submits that in addition to the Reasons for the Allowance of the Writ, set out at pages 7-13 of the petition for certiorari, the Writ should be granted:

1. Because the importance of the question presented extends beyond the validity of petitioner's conviction, not only to the validity of the detention in conscientious objector camps of some 3,000 conscientious objectors who have already completed a full twelve months' service, but to the validity of the conviction and imprisonment of other such conscientious objectors for resistance to such detention.

2. Because, while petitioner believes it has been made abundantly clear that the Extension Acts have no application either to petitioner or to similar conscientious objectors, it has been impossible within the appropriate limits of a petition for certiorari to review the legislative history of those Acts which petitioner believes would further support his contention.

3. Because the importance of the question presented accordingly requires that opportunity should be afforded, not only to petitioner, but to the Government, for a more adequate and exhaustive discussion of that question, and this can be afforded only by issuance of the Writ.

Respectfully submitted,

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CITATIONS

Cases:

Roodenko v. *United States*, 147 F. 2d 752, certiorari denied, 324 U. S. 860 — 8

Statutes and regulations:

Selective Training and Service Act of 1940 (Act of September 16, 1940, c. 720, 54 Stat. 885), as amended:

Sec. 3 (a) (50 U. S. C. App., Supp. V, 303 (a)) — 5, 10, 12

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The Service Extension Act of 1941 (Joint Resolution of August 18, 1941, c. 362, 55 Stat. 626, 50 U. S. C. App., Supp. V, 351, 352) — 6, 7, 13

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 342

DANIEL BIRMELI DINGMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 24–29) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered June 4, 1946 (R. 29). On July 3, 1946, the time for filing a petition for a writ of certiorari was extended to August 1, 1946, by order of Mr. Justice Reed (R. 31). The petition was filed August 1, 1946. The jurisdiction of this

Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (a) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether, under the Selective Training and Service Act of 1940 and the statutes extending the periods of service thereunder, a person classified IV–E as a conscientious objector can be required to serve in civilian work of national importance for a period in excess of one year.

STATUTES AND REGULATIONS INVOLVED

The relevant portions of the Selective Training and Service Act of 1940, the Service Extension Act of 1941, the Territorial Use of Army and Extension of Service Act, and the executive order and Selective Service regulations promulgated thereunder, are set out in the Appendix, *infra,* pp. 12–16.

STATEMENT

A one-count indictment was returned in the District Court for the Northern District of California on August 6, 1945, charging that on July 22, 1945, petitioner, who had theretofore been classified IV–E [conscientious objector opposed to combatant and noncombatant military service] and assigned to a civilian public service camp for work of national importance, did knowingly, will-

fully, and feloniously absent himself without authority from the camp, in violation of the Selective Training and Service Act of 1940, as amended (R. 2–3). Petitioner, appearing *in propria persona* (R. 9, 10, 13), demurred to the indictment (R. 4–9) on the grounds (1) that the establishment of civilian public service camps for conscientious objectors was not authorized by the Selective Training and Service Act or any other law and was merely a gratuitous assumption of power by the Director of the Selective Service System, and (2) that he had already served at such camps for the full period of one year, "which is the maximum period of service that can be inferred reasonably from the said Act to be required of him" (R. 6). The demurrer was overruled (R. 10), and after a trial by jury (R. 10–11) petitioner was convicted (R. 11). His motion for arrest of judgment, on the ground that the indictment did not state an offense, was overruled (R. 11–12, 16), and he was sentenced to imprisonment for three years (R. 12, 13–14). On appeal to the Circuit Court of Appeals for the Ninth Circuit, the conviction was affirmed (R. 29).

The undisputed facts in support of the conviction are briefly as follows:

Petitioner was classified IV–E by his local board and thereafter, on June 24, 1943, he was ordered to report for work of national importance. Pursuant to this order, he reported to

Civilian Public Service Camp No. 32, at West Campton, New Hampshire, on July 9, 1943. (See order to Report for Work of National Importance, Gov. Ex. 1.[1]) Thereafter petitioner was transferred to a series of camps, terminating in his assignment to Camp No. 148, from which he absented himself without authority on July 22, 1945, as charged in the indictment (see Order of Transfer, Gov. Ex. 2; see also R. 6). Thus it appears that petitioner served in public service camps for approximately two years.

ARGUMENT

The only contention made by petitioner here is that under the Selective Training and Service Act of 1940 and the statutes extending the periods of service under that Act, conscientious objectors cannot be required to perform work of national importance for a period in excess of twelve months and that, therefore, his unauthorized absence after he had worked as assigned for more than that period was not unlawful. The validity of this contention depends in turn upon the validity of Selective Service Regulation 652.14 (see pp. 15–16, *infra*), which provides that a registrant

[1] Government Exhibits 1 and 2 were introduced at the trial (R. 11) but not incorporated in the record on appeal (see R. 18–19). By stipulation of August 7, 1946 (R. 32), counsel agreed that these exhibits, which have been filed with the Clerk, may be considered as part of the record before this Court.

classified IV–E and assigned to a camp shall be engaged in work of national importance for the duration of the war and six months thereafter, unless sooner released by the Director of Selective Service. That term of service is the same as is required in respect of registrants who are drafted into the armed forces (see pp. 6–7, *infra*). Petitioner admittedly had not served for the period required by the Regulation, nor had he been released by the Director of Selective Service.

Contrary to petitioner's contention, the challenged regulation adheres to the legislative policy expressed in the Selective Training and Service Act of 1940 and the amendments upon which petitioner relies. Section 3 (a) of the 1940 Act declares that "except as otherwise provided in this Act," every male citizen and resident of the United States within specified age limits is "liable for training and service in the land or naval forces of the United States" and authorizes the President "to select and induct" men into such forces. Section 3 (b) provided that each man "inducted under the provisions of subsection (a) shall serve for a training and service period of twelve consecutive months, unless sooner discharged, except that whenever the Congress has declared that the national interest is imperiled, such twelve-month period may be extended by the President to such time as may be necessary in the interests of national defense." Section 5 (g) provides an

exemption from military service for those who are found to be conscientiously opposed to participation in combatant or noncombatant service, but requires that such registrants shall, "in lieu of such induction, be assigned to work of national importance under civilian direction." (*Infra,* pp. 12–13.) On August 18, 1941, Congress enacted the Service Extension Act of 1941 declaring that the national interest was imperiled and authorizing the President in Section 2 (*infra,* pp. 13–14) "to extend, for such periods of time as may be necessary in the interests of national defense [but not to exceed eighteen months], the periods of service, training and service * * * of any or all persons inducted for training and service under" the Selective Training and Service Act and of other designated classes of persons subject to active military service. On August 21, 1941, by Executive Order No. 8862 (*infra,* pp. 14–15), the President extended the period "of training and service of all persons inducted for training and service" under the Act to eighteen months. Following the declaration of war, Congress by the Act of December 13, 1941 (*infra,* p. 15), provided that "the periods of service, training and service, * * * of all members of the Army of the United States now or hereafter in or subject to active military service * * * are extended for" the war and six months following its termination. On December 20, 1941, Congress enacted

a similar provision covering persons inducted into the naval forces (c. 602, § 8, 55 Stat. 846). On December 24, 1941, the Director of Selective Service promulgated Section 652.14 of the Selective Service Regulations (*supra,* pp. 4–5) prescribing a like period of service for conscientious objectors drafted to perform work of national importance.

Petitioner argues that the extension acts of August and December 1941, which refer, respectively, only to persons "inducted for training and service" under the Selective Training and Service Act and to persons "subject to active military service," did not authorize in respect of conscientious objectors any extension of the twelve-month period of service provided in Section 3 (b) of the original act. We think it is evident, however, from a critical analysis of all the Selective Service legislation involved here that all persons drafted under the Selective Training and Service Act are subject to serve for the duration of the war and six months thereafter. The mandate in Section 5 (g) that conscientious objectors shall be assigned to work of national importance "in lieu of such induction" obviously means that they are to serve in such work as an alternative for the military training and service they would otherwise be required to undergo.

Conscientious objectors opposed to both combatant and noncombatant military service are not

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exempted from service. They are subject to the draft the same as others having no conscientious scruples against military service, the only difference being that Congress accorded them the privilege of performing their service in work deemed of national importance "in lieu of" military service. Cf. *Roodenko* v. *United States,* 147 F. 2d 752, 754 (C. C. A. 10), certiorari denied, 324 U. S. 860. While this concession may have been required by the legislative determination to accede to the personal convictions of conscientious objectors, that factor did not make it necessary or appropriate to require less service of these persons than is required of other draftees. It is reasonable to conclude, therefore—particularly in the absence of any persuasive evidence to the contrary—that Congress, having provided for the drafting of conscientious objectors under like conditions as provided for other persons, except as to the type of service to be performed, intended to require them to serve for the same period of time as persons drafted into the armed forces. To conclude otherwise would attribute to Congress an intention to create a draft system which unjustly and without logical basis would require one class of draftees to serve for far longer periods of time than another. This was the view of the Director of Selective Service, for he explained his action in promulgating Regulation 652.14 as follows:

> In keeping with the original Selective Service Act, it was expected that assignees would serve one year in camp and then be released. However, congressional action extended the term of service for men in the Army. It was interpreted to apply to assignees as well, so that their term of duty was increased to 18 months. Similarly, when the Army released men over 28 years old, the Camp Operations Division did the same. The general rule has been to follow Army policy in matters of this kind as closely as possible, not because the assignees were considered to have a military status, but with the idea of making the conditions of their service comparable wherever this could be done. It was felt that assignees should be neither favored, nor punished because of their beliefs, but as far as the law allowed, they should undergo the same inconveniences and receive the same benefits as the men in service.[2]

It is significant that in several successive sessions after the promulgation of this Regulation Congress appropriated funds for the operation and management of the civilian public service camps without questioning its propriety. See, e. g., 50 U. S. C. App., Supp. V, 309a.

The fallacy of petitioner's argument lies in his failure to recognize that the language of the two extension acts of 1941, upon which he relies, is

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[2] First Report of the Director of Selective Service, 1940–1941, *Selective Service in Peacetime* (1942), p. 200.

substantially the same as that employed in Section 3 (b) of the original act, which he assumes applied to conscientious objectors (see Pet. 3, 6, 8). But Section 3 (b), like the extension acts, refers only to persons "inducted" under the provisions of Section 3 (a) into the land and naval forces. And, as we have demonstrated (*supra*, pp. 7–8), Section 5 (g), requiring service in work of national importance "in lieu of such induction," when read in context with Section 3 (b), clearly implies a policy that conscientious objectors might be required to serve for a period of twelve months unless sooner discharged. The extension acts merely amended Section 3 (b) by enlarging the periods of service which might be required of registrants drafted under the Selective Training and Service Act, and did not purport to alter the policy of the Act requiring conscientious objectors to perform an equivalent service.

Petitioner's argument is thus based upon an untenable distinction between the applicable statutes. If, as he has no difficulty assuming, Section 3 (b) of the original act applied to limit the required service period of conscientious objectors to twelve months, then the two extension acts of 1941 similarly applied and were authority for the promulgation of Regulation 652.14. If, on the other hand, the extension acts are to be read literally, as petitioner urges, so as not to apply to such persons, Section 3 (b) must be sim-

ilarly construed. In the latter event, there was no controlling legislative provision and the matter was properly one for the determination of the Director of Selective Service acting in accordance with the general policy laid down by Congress. That policy, as we have already noted, was followed in the promulgation of the Regulation, and it has likewise been followed in respect of the release of conscientious objectors.[3]

CONCLUSION

The decision below is clearly correct, and there is no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
SHELDON E. BERNSTEIN,
Attorneys.

SEPTEMBER 1946.

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[3] The Camp Operations Division of the Selective Service System has adopted a plan for the discharge of men from CPS camps similar to that for the demobilization of Army personnel. This plan has been effectuated by a series of directives to all CPS camps and institutions, the first of which was issued on or about October 18, 1945. Each of these directives sets forth the release procedures and qualifications to be employed and each in turn follows the standards for discharge then prevailing for the Army. The directive of June 24, 1946, is illustrative and is printed in the Appendix, *infra*, pp. 16–19.

APPENDIX

The Selective Training and Service Act of 1940 (Act of September 16, 1940, c. 720, 54 Stat. 885), as amended, provides in pertinent part:

> SEC. 3 (a) (50 U. S. C. App., Supp. V, 303 (a)). Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of eighteen and forty-five at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States * * *. The President is authorized from time to time, whether or not a state of war exists, to select and induct into the land and naval forces of the United States for training and service, in the manner provided in this Act, such number of men as in his judgment is required for such forces in the national interest * * *.
>
> (b) (50 U. S. C. App. 303 (b)). Each man inducted under the provisions of subsection (a) shall serve for a training and service period of twelve consecutive months, unless sooner discharged, except that whenever the Congress has declared that the national interest is imperiled, such twelve-month period may be extended by the President to such time as may be necessary in the interests of national defense.
>
> SEC. 5 (g) (50 U. S. C. App. 305 (g)). Nothing contained in this Act shall be construed to require any person to be

> subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction. * * *

The Service Extension Act of 1941 (Joint Resolution of August 18, 1941, c. 362, 55 Stat. 626, 50 U. S. C. App., Supp. V, 351, 352), provided in pertinent part:

> SEC. 1. * * * the Congress, acting in accordance with and solely for the purpose of carrying into effect the provisions of section 3 (b) of the Selective Training and Service Act of 1940, hereby declares that the national interest is imperiled.
>
> SEC. 2. The President is hereby authorized, subject, however, to the condition hereinafter stated, to extend, for such periods of time as may be necessary in the interests of national defense, the periods of service, training and service, enlistment, appointment, or commission, of any or all persons inducted for training and service under said Act, members and units of the reserve components of the Army of the United States (including the National Guard of the United States), retired personnel and en-

listed men of the Regular Army, and any other members of the Army, who are now, or who may hereafter be, in or subject to active military service, or training and service: *Provided,* That extension of the periods of active military service, or training and service, in the case of any person subject to the provisions of this section, shall not, without his consent, exceed eighteen months in the aggregate; except that whenever the Congress declares that it is in the interests of national defense to further extend such periods of active military service and training and service, such periods may be further extended by the President, in the case of any such persons, for such time as may be necessary in the interests of national defense: *Provided further,* That the authority hereby conferred is subject to the condition that the delegation of such authority may be revoked at any time by concurrent resolution of the Congress.

Executive Order No. 8862 of August 21, 1941 (6 F. R. 4319), provided in part:

By virtue of the authority conferred upon me by section 2 of the Service Extension Act of 1941 (Public Law 213, 77th Congress), approved August 18, 1941, and as Commander-in-Chief of the Army and Navy of the United States, it is ordered as follows:

1. The periods of training and service of all persons inducted for training and service under the provisions of the Selective Training and Service Act of 1940, as amended, who are now, or who may hereafter be, in such training and service are hereby extended for a period of eighteen

months, unless such persons are sooner discharged. * * *

The Territorial Use of Army and Extension of Service Period Act (Act of December 13, 1941, c. 571, 55 Stat. 799; 50 U. S. C. App., Supp. V, 731, 732) provides in pertinent part:

> SEC. 1. * * * the provisions of Public Resolution Numbered 96, Seventy-sixth Congress, approved August 27, 1940, as amended, and of Public, Numbered 783, Seventy-sixth Congress (the Selective Training and Service Act of 1940), as amended, insofar as they restrict the territorial use of units and members of the Army of the United States, are suspended during the existence of any war in which the United States is engaged, and during the six months immediately following the termination of any such war.
>
> SEC. 2. The periods of service, training and service, enlistment, appointment, or commission, of all members of the Army of the United States now or hereafter in or subject to active military service of the United States are extended for the period stated in the preceding section: *Provided,* That nothing in this section shall be construed to prevent the President from terminating such periods of service, training and service, enlistment, appointment, or commission at an earlier date in any case.

Selective Service Regulation 652.14, effective February 1, 1942 (7 F. R. 112), provides in pertinent part:

> *Period of service.*—(a) A registrant in Class IV–E who has been assigned to a camp shall be engaged in work of national

importance under civilian direction during the existence of any war in which the United States is engaged and during the six months immediately following the termination of any such war, unless sooner released under the same conditions as pertain in the armed forces.[4]

The June 24, 1946, directive of National Headquarters of the Selective Service System concerning the release of conscientious objectors read as follows:

JUNE 24, 1946.

To all Camps and Institutions Using Conscientious Objectors:

Subject: Plan for Discharge of Men from CPS Camps.

1. Beginning July 1, 1946 application may be made for discharge by the following classes of conscientious objectors assigned to work of national importance. Applications for discharge will contain specific information as to whether the assignees desire transportation or not. If transportation is requested, information as to the railheads or bus stations, between which the travel is desired, will be included along with the physical examination, DSS Form 222, completed on or after July 1, 1946.

a. Those who will have reached their 38th birthday on or before July 31, 1946.

b. Those who will have reached their 35th birthday and will have completed two (2) years of service on or before July 31, 1946.

c. Any assignee who is the natural father

[4] The regulation was amended effective July 23, 1945 (10 F. R. 9214) by striking all after the word "released" and substituting therefor "by the Director of Selective Service."

of three (3) or more children under 18 years of age who are dependent upon him for support. (See Paragraph 3.)

d. Those who have completed twenty-four (24) months of service on or before June 30, 1946.

e. Any assignee who has completed eighteen (18) months of service on or before June 30, 1946 and who is the natural father of two (2) children under 18 years of age who are dependent upon him for support. (See Paragraph 3.)

f. Any assignee who has completed twenty-one (21) months of service on or before June 30, 1946 and who is the natural father of one (1) child under 18 years of age who is dependent upon him for support. (See Paragraph 3.)

2. Applications for discharge in the following categories should be submitted through the regular channels and will be processed on an individual basis through the Separation Board.

a. Applications for discharge on the grounds of unusual hardship.

b. Applications for discharge on the grounds it is in the national health, safety or interest.

c. Applications for discharge on the grounds of physical disability.

d. Applications for discharge of any assignee who has three (3) or more dependents under 18 years of age who occupy a status similar to that of natural children to the assignee. (See Paragraph 3.)

e. Application for discharge of any assignee who has completed eighteen (18) months of service on or before June 30, 1946 and who has two (2) dependents under 18 years of age who occupy a status similar

to that of natural children to the assignee. (See Paragraph 3.)

f. Application for discharge of any assignee who has completed twenty-one (21) months of service on or before June 30, 1946 and who has one dependent under 18 years of age who occupies a status similar to that of a natural child to the assignee. (See Paragraph 3.)

Applications submitted under "a" and "b" above must be supported by substantiating evidence giving names and addresses of all persons concerned, statements of medical officers and others familiar with all facts.

Applications submitted under "c" above should be accompanied by a recent physical examination of the assignee on D. S. S. Form 222. Other applicants under this paragraph need not submit physical examinations until called for. Each application should show railheads or bus stations between which transportation is desired upon discharge.

3. Applications for discharge under Paragraph 1 (c), (e) and (f) and Paragraph 2 (d), (e) and (f) will contain the following information:

a. Full name of mother of children.

b. Date of marriage of assignee and mother of children.

c. Full name and date of birth of each child.

d. Present location of dependents.

4. Applications for discharge will be accompanied by a certificate from the Camp Director to the effect that the applicant has not participated in any refusal to work since April 15, 1946.

In the event that the above certificate cannot be made a detailed statement will be submitted by the concerned Camp Director giving dates, offense, etc.

5. Care should be exercised to see that all data called for is submitted, otherwise application will be returned for correction and thus delay discharge. Applications and physical examinations dated prior to dates specified in this directive will be returned without action.

For The Director,

LEWIS F. KOSCH,
Colonel, Field Artillery,
Assistant Director—Camp Operations.

U. S. GOVERNMENT PRINTING OFFICE: 1946

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IN THE

Supreme Court of the United States

OCTOBER TERM—1946

No. 342

DANIEL BIRMELI DINGMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF ORDER OF OCTOBER 14, 1946, DENYING PETITION FOR A WRIT OF CERTIORARI

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December 18, 1946.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1946

DANIEL BIRMELI DINGMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

No. 342

PETITION FOR REHEARING OF ORDER OF OCTOBER 14, 1946, DENYING PETITION FOR A WRIT OF CERTIORARI

Counsel recognizes that a petition for rehearing of a denial of certiorari cannot be warranted, or otherwise than futile, unless based upon the most convincing and compelling grounds. Counsel believes that such grounds here exist.

Indeed, counsel believe this to be not only the unusual case where a petition for rehearing of a denial of certiorari is warranted and should be granted, but the still more unusual case where the Solicitor General would be warranted in now consenting to the issuance of the writ, unless he is in a position to controvert the facts shown by this petition.

I.

This petition will show that the legislative history of the Extension of Service Acts of August 18 and December

13, 1941, under which, if at all, petitioner's conviction must be sustained,* demonstrates beyond reasonable question:

(a) that the Executive in requesting such Acts, and the Congress in enacting them, specifically intended to limit the extensions of service there provided so as to apply *solely to such persons* as, of the date of those Acts, might be "now or hereafter in or subject *to active military service*";

(b) that therefore the specific language of such Acts, *expressly* limiting the extensions of service there

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*It now clearly appears that petitioner's conviction can be sustained, if at all, only under such Extension of Service Acts.

The Government's Brief in Opposition, p. 4, expressly concedes that at the time petitioner, as charged in the indictment, allegedly absented himself without authority from Civilian Public Service Camp No. 148, petitioner had already served in public service camps *for approximately two years.*

This concession is based on Government Exhibits 1 and 2 which were introduced at the trial (R. 11) but were not incorporated in the record on appeal to the Circuit Court of Appeals (R. 18-19), but by stipulation of August 7, 1946 (R. 32) between counsel for the Government and counsel for the petitioner, have been filed with this Court and may be considered as part of the record before it (see footnote p. 4 Government's brief in opposition).

Petitioner's conviction therefore cannot be sustained under the Selective Training and Service Act of 1940 as originally enacted, since Section 3(b) of that Act (see Appendix E to this petition) limits service under that Act to twelve months.

If petitioner's conviction can be sustained, it, therefore, can only be under the Extension of Service Acts of August 18 and December 13, 1941, which removed such twelve months limitation on service.

Finally, as noted in the footnote, p. 4 of the petition for certiorari, petitioner was not, and obviously could not have been, indicted or convicted for a violation of the Selective Training and Service Act of 1940 *as originally enacted,* but was expressly indicted and convicted for an alleged violation of that Act *as amended* (R. 2, 13), i.e., by such Extension of Service Acts.

provided solely to such persons "now or hereafter in or subject to active military service",* was knowingly and intentionally used in order to carry out such intention of the Executive and of the Congress; and,

(c) *that neither the Executive nor the Congress had any intention whatever that the extensions of service provided by such Acts should apply to such conscientious objectors who, like petitioner, never had been, nor could ever be "now or hereafter in or subject to active military service",* because by the express provisions of Section 5(g) of the Selective Training and Service Act of 1940 such conscientious objectors could *only be "assigned to work of national importance under civilian direction",* since found conscientiously opposed even to non-combatant service.**

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*Though the Government has not raised the point, it might be contended that in the Extension of Service Act of August 18, 1941, the limiting words "who are now, or who may hereafter be, in or subject to active military service", are grammatically confined to the immediately preceding words "and any other members of the Army". That this is not so is shown by the use in the immediately succeeding proviso of the words "active military service" in obviously *inclusive* application to "any person subject to the provisions of this section." See text of Extension of Service Act of August 18, 1941, (Service Extension Act of 1941) p. xxxiv of Appendix E to this petition.

**Counsel believe that frankness with this Court requires them to state that the rationale of the legislative history of the Extension of Service Acts of August 18 and December 13, 1941, would not seem to sustain the contention made at pages 2-3 of petitioner's reply to the brief in opposition, that those Acts do not apply even to conscientious objectors who, *unlike petitioner,* have been *actually inducted for non-combatant service,* since not found conscientiously opposed to such service. In this respect counsel wish to revert to the position taken at page 6 of the petition for certiorari that *such conscientious objectors* may well be subject to the extended periods of service provided by

II.

This is conclusively shown by the following facts:

(A) *Nowhere in the entire legislative record of either of such Extension of Service Acts is there a single word referring to the extension of service of conscientious objectors, nor with two irrelevant exceptions,* is there even a mention of "conscientious objectors" in any connection.*

That record, it will be shown, covers all Executive communications asking or relating to the enactment of such Extension of Service Acts, numerous committee and conference reports relating thereto, debates in the Senate and

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such Acts. The legislative history of such Acts indicates that the Congress clearly had in mind that "active military service" may be *non-combatant* as well as combatant, and that therefore to limit the meaning of "active military service" solely to *combatant service* would be an unjustifiably narrow construction. For instance, while medical corpsmen are clearly non-combatants, they not only have been trained for, but many of them undeniably have rendered extremely "active military service". Furthermore, many medical corpsmen have been conscientious objectors, who, *because not found to be opposed to non-combatant service,* have therefore been inducted for such service under the express provisions of Section 5 (g) (1) of the Selective Training and Service Act of 1940. As to *such conscientious objectors* there could seem to be no reason why the Extension of Service Acts should not apply to them as well as to medical corpsmen who are not conscientious objectors.

*A. J. Muste in a hearing before the Senate Committee on Military Affairs on S. J. Res. 92 and 93 asked that Section 5(g) of the Selective Training and Service Act of 1940 be amended so as unconditionally to exempt, even from assignment to work of national importance under civilian direction, any conscientious objector found to be conscientiously opposed to participation even in such work.

The only other mention was a casual and irrelevant reference, during debate in the House, to the fact that Sergeant York had originally been a conscientious objector (Cong. Rec. 77th Cong. Vol. 87 Part 6 p. 6933).

House covering several hundred pages of the Congressional Record, and reports of hearings before the respective Committees on Military Affairs of the Senate and House, likewise several hundred pages in length.

(B) *Moreover, throughout such Executive communications, committee reports, conference reports, hearings and debates all references are explicity or implicitly confined exclusively* to those then or thereafter in or subject to *active military service,* and to the necessity of extending the periods of such *active military service* for the express purpose of preventing, in time of national danger, the disintegration of personnel and units already trained for *such service* by mandatory discharge after twelve months' service, and of permitting their retention for the training of new personnel and units for *active military service.**

In factual support of the foregoing statements in I and II of this petition, there are attached as appendices hereto:

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*As noted in the second footnote on page 3 of this petition, it would appear from such legislative history that the term "active military service" may reasonably be construed to include not only combatant but *non-combatant* "active military service", and may therefore include conscientious objectors who, *unlike petitioner,* have not been found opposed to non-combatant service, and thus, under the express provisions of Section 5 (g) (*1*) have actually been *inducted for such service.* Even thus broadly construed, however, the term "active military service" cannot include conscientious objectors, who, *like petitioner,* having been found conscientiously opposed even to non-combatant service, therefore *cannot be inducted for any military service whatever,* but under the express provisions of Section 5 (g) (*2*) of the Selective Training and Service Act of 1940 must in lieu thereof be merely "*assigned* to work of national importance *under civilian direction*".

Appendix A—Resumé of the legislative history of the Extension of Service Act of August 18, 1941.

Appendix B—Excerpts from the legislative history of the Extension of Service Act of August 18, 1941.

Appendix C—Resumé of the legislative history of the Extension of Service Act of December 13, 1941.

Appendix D—Excerpts from the legislative history of the Extension of Service Act of December 13, 1941.

Appendix E—Relevant portions of the Selective Training and Service Act of 1940, and of the Extension of Service Acts of August 18 and December 13, 1941.

III.

It therefore appears:

A. That petitioner, a conscientious objector who, under the express provisions of Section 5(g) of the Selective Training and Service Act of 1940, *never has been, nor ever could be* "in or subject to active military service", nevertheless has been convicted of the violation of amendments to that Act, which by their express terms and by proved Executive and Congressional intent, *can apply only to those persons* "now or hereafter in or subject to *active military service*".

B. That the contentions of the Government that the application of such Extension of Service Acts is not so limited are fallacious. These contentions are the following:

1. The Government contends that since petitioner himself concedes that although the twelve months' period of service provided by Section 3 (b) of the Selective Training and Service Act of 1940 does not in express terms apply to conscientious objectors such as petitioner, who have not been inducted for active military service but in lieu of such induction have been assigned to work of national importance under civilian direction, it follows that the extensions of such twelve months period of service provided by the Extension Acts of August 18 and December 13, 1941, must likewise be construed to apply to such conscientious objectors, even though the language thereof appears expressly to exclude them. In other words, the Government argues that since the language of Section 3(b) of the 1940 Act is not to be construed literally, neither should the language of the Extension Acts of August 18 and December 13, 1941, be so construed. As shown at pages 2-4 of petitioner's reply to the brief in opposition, this is a *non-sequitur*.

Section 3(b) cannot be construed literally without unreasonable and possibly unconstitutional results. To construe the twelve months' limitation of service provided by that Section as not applying to such conscientious objectors as petitioner, would condemn them, unlike any other selectees, to indeterminate service, the length of which would be limited only by the will of the President. Since there is nothing in the language of that Section expressly excluding such conscientious objectors, it is therefore clearly

permissible to construe that language as including them, in order to avoid such results. *Moreover, it is to be noted that the Government itself so construes Section 3(b), and nowhere has claimed that under Section 3(b) petitioner's term of assignment is indeterminate and, therefore, that petitioner's conviction would be sustainable under Section 3(b), even should such subsequent Extension of Service Acts be found inapplicable to petitioner.*

On the other hand, the language of the Extension Acts of August 18 and December 13, 1941, expressly limiting the extensions of service there provided to those "now or hereafter in or subject to active military service" can be construed literally without any such unreasonable or possibly unconstitutional results. Moreover, such language cannot be construed as including conscientious objectors such as petitioner, *who never have been or can be* "in or subject to *active military service*", without violating the proved Executive and Congressional intention to the contrary in the use of such limiting language.

2. The Government contends that the appropriation of funds by the Congress for the operation and maintenance of Civilian Public Service Camps subsequent to the promulgation of Selective Service Regulation 652.14, constitutes Congressional affirmance of such Regulation, which construes such Extension of Service Acts as applying to conscientious objectors assigned to work of national importance.

This again is a *non-sequitur* as shown on pages 5 and 6 of petitioner's reply to the Government's brief in opposition. The operation and maintenance of such Civilian

Public Service Camps would still continue necessary for the handling of new conscientious objectors, still assignable to such camps for twelve months service under the continuing application to such conscientious objectors of Sections 3(b) and 5(g) of the Selective Training and Service Act of 1940, even though neither their periods of service nor that of such conscientious objectors who have already completed such twelve months service, have been extended by such Extension Acts.

3. The Government contends that it has been its policy to make the conditions of service of conscientious objectors assigned to work of national importance, comparable to the conditions of service of selectees actually inducted into the Army. As shown at pages 6-8 of petitioner's reply to the brief in opposition, the facts clearly contradict this contention of the Government.

IV.

It would seem, therefore, that petitioner is now clearly entitled to certiorari to review his conviction unless his petition therefor was fatally defective in law because it did not set out the legislative history of the Extension Acts of August 18 and December 13, 1941. This, counsel respectfully submit, is not the case.

Such legislative history constitutes mere confirmatory evidence of the construction of such Extension of Service Acts alleged in the petition for certiorari, which construction is supportable by valid canons of statutory construction, even without such legislative history.

Furthermore, as suggested at page 9 of the petition for certiorari, it is doubtful whether within the appropriate limits of a petition for certiorari as prescribed by Rule

38(2) of this Court, such confirmatory evidence by way of legislative history could properly be presented either in a petition for such writ or in a supporting brief, because of its necessarily extensive character. Such legislative history would, as there suggested, appear to be more properly a matter for adequate and exhaustive discussion after issuance of certiorari.

Moreover, limitations of time imposed in criminal cases by Rule 37b(2) of the Rules of Criminal Procedure, would, in any event, have prevented an adequate review and analysis of such legislative history in the petition for certiorari. It, indeed, would not have been possible even in this petition for rehearing, except for the extensions of time granted by the orders of this Court of October 28, 1946 and December 4, 1946, for the presentation of this petition. This fact was expressly alleged in the application for such order of October 28, 1946, as a ground for the extension there granted, in addition to the grounds relating to the personal disability of counsel.

V.

Finally, it would appear that reasons of public concern warrant the granting of this petition for rehearing, and thereupon for the issuance of certiorari.

The question here presented is one of general Federal law not heretofore determined by this Court. It concerns not only the validity of petitioner's conviction and confinement in a penitentiary. It concerns also the validity of the present detention in conscientious objector camps of several thousand conscientious objectors who have already served the twelve months term prescribed by the Selective Service and Training Act of 1940, as well as the validity of the conviction and penal confinement of numerous conscientious

objectors based on similar constructions of the Extension of Service Acts of 1941. Unless this Court, therefore, on application for the *discretionary* writ of certiorari shall expressly and definitively determine the question of general law here presented, petitioner and other similar conscientious objectors now confined in conscientious objector camps or in prison, will have no other practical remedy than a blanket application to this Court for the issuance by this Court of an original writ of *habeas corpus, which is a writ of right and not of discretion.**

Plainly, individual applications for writs of *habeas corpus* to the various District Courts of the United States would neither afford adequate remedy from the point of view of such conscientious objectors, nor be practicable from the point of view of the Government. The District Courts thereby would be burdened with a multitude of such applications. Furthermore, should certiorari be here denied, *without opinion,* it is reasonable to assume that such District Courts would deny individual applications for *habeas corpus.* This, in turn, would involve a multitude of appeals to the several Circuit Courts of Appeal, which, it may be reasonably assumed, likewise would deny such appeals, thus burdening this Court with numerous applications for certiorari to review such denials. Under such circumstances, it does not seem open to doubt that a blanket petition to this Court for an original *habeas corpus* would be the only practicable remedy available and should lie.

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*It is respectfully submitted, moreover, that Rule 5 of this Court, requiring motions for leave to file cases on the original docket, cannot operate to make a writ of *habeas corpus* a discretionary writ or other than a writ of right, and if intended or construed so to do, would be invalid if applied to original writs of *habeas corpus,* as constituting an unconstitutional abridgement of that writ.

However, this Court by issuing certiorari and, thereunder, expressly and definitively deciding the question of general law here presented, irrespective of what that decision may be, *can obviate any necessity for resort to habeas corpus either by way of blanket application to this Court for an original writ or by a multitude of applications to the several District Courts.*

If that question is expressly and definitively decided contrary to petitioner's contentions, any resort thereafter to *habeas corpus* would obviously be futile. If petitioner's contentions, however, be expressly and definitively sustained, counsel feel assured that the Government would accord such decision due recognition and respect and, by Executive clemency or otherwise, would render resort to *habeas corpus,* unnecessary, so far as concerns conscientious objectors of petitioner's category.

Accordingly, petitioner respectfully petitions for rehearing of the order of October 14, 1946, denying the petition for certiorari herein, and prays that, thereupon, such writ shall issue and that, in due course thereafter, petitioner's conviction be reversed and set aside.

Respectfully submitted,

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December 18, 1946.

RESUME OF THE LEGISLATIVE HISTORY OF THE EXTENSION OF SERVICE ACT OF AUGUST 18, 1941

The following, counsel believe, comprise complete citations to the legislative history of the Extension of Service Act of August 18, 1941, including citations to its parliamentary history both in the Senate and the House of Representatives, Senate, House, and conference reports, relating thereto; hearings before the respective Committees on Military Affairs of the Senate and House; debates in both the Senate and House; and all relevant Executive communications. All page citations, unless otherwise specified, are to Congressional Record, 77th Congress, First Session, Volume 87, Part 6.

SENATE

July 10, 1941 S. J. Res. 92 and 93, introduced by Senator Reynolds and referred to Committee on Military Affairs (p. 5952).

July 21, 1941 S. J. Res. 95, introduced by Senator Thomas in substitution for S. J. Res. 92 and 93, and referred to Committee on Military Affairs (p. 6151).

July 17, 18, 21, 22, 23 and 24, 1941. Hearings before Committee on Military Affairs on S. J. Res. 92 and 93, and on S. J. Res. 95 in substituition therefor. Printed report of these hearings is officially captioned, "Retention of the Reserve Components and Selectees *in Military Service* Beyond Twelve Months" (Italics supplied).

July 25, 1941	Letter from Secretary of War to Senator Reynolds, Chairman of Committee on Military Affairs, United States Senate. (See S. Rept. No. 595, pp. 8 and 9).
July 28, 1941	Report of Committee on Military Affairs filed in Senate (p. 6329). See Senate Report No. 595 "to accompany S. J. Res. 95".
July 30, 1941	Debated in Senate (pp. 6430-6451).
July 31, 1941	Further debated (pp. 6494-6519).
August 1, 1941	Further debated (pp. 6465-6494).
August 4, 1941	Further debated (pp. 6660-6667, 6683).
August 5, 1941	Further debated (pp. 6736-6762).
August 6, 1941	Further debated (pp. 6811-6832).
August 7, 1941	Further debated and passed by Senate (pp. 6847-6881).
August 14, 1941	Senate concurred in House Amendments to S. J. Res. 95 and passed resolution as amended (pp. 7123-7126). See Sen. Doc. No. 108, dated August 14, 1941.

HOUSE OF REPRESENTATIVES

July 21, 1941	Message from President to Congress, H. R. Doc. No. 318.
July 21, 1941	H. J. Res. 217 and 218 introduced by Rep. May and referred to Committee on Military Affairs (p. 6234).
July 23, 1941	H. J. Res. 220 introduced by Rep. May and referred to Committee on Military Affairs (p. 6262).
July 24, 1941	H. J. Res. 222, introduced by Rep. May and referred to Committee on Military Affairs (p. 6327).

July 22, 25 and 28, 1941 Hearings before Committee on Military Affairs on H. J. Res. 217, 218, 220 and 222. (See printed report of hearings.)

August 1, 1941 Report of Committee on Military Affairs filed in House and referred to Committee of Whole House (p. 6657). See H. Rept. No. 1117 of August 1, 1941 "to accompany H. J. Res. 222".

Note: H. J. Res. 217, 218 and 220 not reported and no further record of them.

August 8, 1941 H. J. Res. 222 debated (pp. 6915-6955).

August 12, 1941 H. J. Res. 222 further debated and passed by House (pp. 6995-7075).

August 12, 1941 Rep. May moved to amend S. J. Res. 95 by striking out all but its title and substituting for its provisions, the provisions of H. J. Res. 222. So amended, passed by House (p. 7076) and House appointed conferees (p. 7077).

Note: As already noted above, on August 14, 1941, the Senate concurred in House amendments to S. J. Res. 95 and passed same as amended.

August 18, 1941 Approved and signed by the President; Public Law 213.

In connection with this legislative history it is stated at page 4 of this petition:

> *"Nowhere in the entire legislative record of either of such Extension of Service Acts is there a*

> *single word referring to the extension of service of conscientious objectors, nor with two irrelevant exceptions, is there even a mention of 'conscientious objectors' in any connection."**

The nature of this statement from page 4 of this petition is such that the only proof which it is practicable to offer this Court is the complete citation, here furnished, to the legislative history of the Extension of Service Acts of August 18, 1941, and the assurance of counsel that such statement is based on a careful reading of that history.

At page 5 of this petition it is stated:

> *"Moreover, throughout such Executive communications, committee reports, conference reports, hearings and debates all references are explicitly or implicitly confined exclusively* to those then or thereafter in or subject to *active military service,* and to the necessity of extending the periods of such *active military service* for the express purpose of preventing, in time of national danger, the disintegration of personnel and units already trained for *such service* by mandatory discharge after twelve months' service, and of permitting their retention for the training of new personnel and units for *active military service."***

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*The two exceptions above referred to are, as shown by the second footnote on page 4 wholly irrelevant to the question here presented.

**As stated in the second footnote on page 3 and in the footnote on page 5 of this petition, the rationale of such legislative history shows that the term "active military service" may reasonably be construed to include conscientious objectors who, *unlike petitioner,* have actually been inducted for non-combatant "active military service", but cannot be construed to include conscientious objectors who, *like petitioner, cannot be inducted for any military service whatever* but, in lieu thereof, may merely be *"assigned to work of national importance under civilian direction."*

This statement from page 5 of this petition permits of more precise proof than the prior statement quoted from page 4 of this petition.

While it is impracticable to attempt any extensive excerpts or quotations from such legislative history, it is practicable to excerpt representative portions of Executive communications requesting the legislation resulting in the Extension of Service Act of August 18, 1941, and of statements made in the Senate and the House by the Chairmen or members of their respective Committees on Military Affairs, as to the scope and purpose of such legislation.

Accordingly, there is set out in Appendix B, at the pages indicated, excerpts from the following:

pp. xi, xii—Message from the President to the Congress, July 21, 1941.

p. xiii—Excerpts from letter from the Secretary of War to the Chairman, Committee on Military Affairs, United States Senate, July 26, 1941.

pp. xiv, xv—Excerpts from statement of Senator Thomas, July 30, 1941 for the Senate Committee on Military Affairs, in connection with Senate Report 595.

pp. xvi, xvii—Excerpts from statement, August 8, 1941, of Rep. May, Chairman of House Committee on Military Affairs, in connection with House Joint Res. 222.

It is submitted that these excerpts fully sustain the statement quoted from page 5 of this petition as to the purpose and scope of the Extension of Service Act of August 18, 1941. Furthermore, counsel assures this Court that nothing to the contrary appears in any of the debates, hearings or reports.

In this connection, the Court's attention is particularly directed to the testimony of the following, contained in the printed report of "Hearings Before the Senate Committee on Military Affairs on S. J. Res. 92, 93 and 95, of July 17, 18, 21, 22, 23 and 24, 1941," at the pages indicated:

General George C. Marshall, pp. 2-43
Major General Jacob L. Devers, pp. 43-49
Major General Milton A. Reckord, pp. 49-57
Major General William H. Haskell, pp. 57-61
Major General John F. Williams, pp. 61-70

Likewise to the testimony of the following in the printed report of "Hearings Before the House Committee on Military Affairs on H. J. Res. 217, 218, 220 and 222, of July 22, 25 and 28, 1941," at the pages indicated:

General George C. Marshall, pp. 1-15
Mr. Grenville Clark, pp. 41-57
Major General Jacob L, Devers, pp. 88-99
Brigadier General Lewis B. Hershey, pp. 99-104

EXCERPTS FROM MESSAGE FROM THE PRESIDENT TO THE CONGRESS, JULY 21, 1941. (H. R. Doc. 318, p. 2.)

"I need scarcely emphasize the fact that if and when an organized and integrated company, battalion, regiment, or division is compelled to send two-thirds of its members home, those who return to civil life, if called to the colors later on would have to go through a new period of organization and integration before a new unit to which they were assigned *could be depended upon for service.* The risks and the weaknesses caused by dissolving *a trained Army* in times of national peril were pointed out by George Washington over and over again in his message to the Continental Congress.

It is therefore obvious that if two-thirds of *our present Army* return to civilian life, it will be almost a year before the *effective Army strength* again reaches 1,000,000 men.

* * * *

Therefore we would be taking a grave national risk unless the Congress were to make it possible for us to maintain our present full *effective strength* and during the coming year give training to as many additional Americans as we can, when *immediate readiness for service* becomes more and more a vital precautionary measure, the elimination of approximately two-thirds of *our trained soldiers,* and about three-fourths of the total officer personnel, would be a tragic error.

* * * *

The objective is, of course, the all important issue. It is to authorize continuance in service of selectees, National Guard, and reserve components of the Army and the retired

personnel of the Regular Army, with the understanding that, should the exigencies of the situation permit, early return to civil pursuits will follow in due course.

* * * *

Because of the swiftness of modern events, I think the Congress should remove the restrictions in regard to the numbers of selectees *inducted each year for training and service.*

And, in order to reduce individual hardships to a minimum, I urge that the Congress provide that employers be asked to continue to keep jobs open for their employees *who have been held in the Army.* * * *

One final word: Time counts. Within 2 months disintegration which would follow failure to take congressional action, will commence *in the Armies of the United States.* Time counts. The responsibility rests solely with the Congress."

EXCERPTS FROM LETTER FROM THE SECRETARY OF WAR TO HON. ROBERT B. REYNOLDS, CHAIRMAN, COMMITTEE ON MILITARY AFFAIRS, UNITED STATES SENATE, JULY 25, 1941 (Senate Rep. No. 595, pp. 8 and 9.)

* * * *

"The War Department favors the enactment of legislation designed to accomplish the following objectives

(a) To extend the terms of enlistments in the Regular Army and its components and to extend the terms of enlistments and appointments in the Reserve components of the Army of the United States for the duration of the national emergency unless sooner terminated by direction of the President.

(b) To authorize the President *to retain in active military service selectees* and members and units of the Reserve components of the Army of the United States *who are now in active military service* for such period as he may deem necessary in the interest of national defense, and to order *into active military service* such numbers of the members and units of the Reserve components who are not now on active duty as he may deem necessary for a similar period.

(c) To authorize the employment of the retired personnel of the Regular Army in active service for such purposes and for such periods as the President may determine."

* * * *

EXCERPTS FROM STATEMENT, JULY 30, 1941, OF SENATOR THOMAS FOR COMMITTEE ON MILITARY AFFAIRS OF THE SENATE IN CONNECTION WITH SENATE REPORT 595. (Congressional Record 77th Congress, First Session, Vol. 87, Part 6, p. 6433)

"The legislation is proposed by the committee in response to the statements of the President in his message of July 21, 1941, to the Congress of the United States that a grave national risk would be involved unless the Congress should make is possible to maintain *the present full strength of the Army,* and during the coming year, as a precautionary measure, to give training to as many additional Americans as we can. In that message the President set forth the urgent need for the immediate enactment of legislation, in such form as the Congress deems appropriate, authorizing the continuance in service of selectees, the members and units of the reserve components of the Army of the United States, including the National Guard of the United States and retired personnel of the Regular Army, with the understanding that, should the situation permit, early return to civil pursuits would follow in due course. The President also emphasized, in view of the swiftness of modern events, the need for the removal of the restrictions in regard to the number of selectees *inducted* each year for training and service under the Selective Training and Service Act of 1940, and in this connection, in order to reduce individual hardships to a minimum, further to include in such legislation provision for reemployment benefits on behalf of all those retained or ordered *into active military service during the present national peril.*

The Chief of Staff of the Army stated to the committee that it is the purpose of the War Department to

release selectees from service as soon as practicable after completion of their 12-months period of training and service, *but to accomplish this without complete disruption of the entire defense force* requires that it be done at such time and in such numbers *as will best preserve the readiness for use of each unit.* This cannot be accomplished on a fixed and inflexible schedule.

Your committee believes that, since the passage of the Selective Training and Service Act of 1940 and Public Resolution 96, Seventy-sixth Congress, international developments have been such as to imperil our national safety and security *and to make essential the maintenance of an adequate and efficient armed force.* To do otherwise would under existing circumstances, be to invite possible disaster.

From the evidence presented to the committee it appears that the national interests are now imperiled and the safety of our country requires that the periods of service of all selectees and members and units of the reserve components of the Army of the United States, as well as all retired personnel and enlisted men of the Regular Army, be extended for such periods of time as are necessary in the national interests."

EXCERPTS FROM STATEMENT, AUGUST 8, 1941, OF REPRESENTATIVE MAY, CHAIRMAN OF COMMITTEE ON MILITARY AFFAIRS OF THE HOUSE OF REPRESENTATIVES IN CONNECTION WITH HOUSE JOINT RES. 222 (77th CONGRESS, FIRST SESSION, VOLUME 87, PART 6, pp. 6916, 6917)

* * * *

"What is the situation; what are we considering?

"We are considering one question and one question only, and that is the question of the extension for a longer period than 12 months of the training and service of the selectees, the National Guard and the Reserve Corps. I call attention to some of the provisions of the original act as a basis for what I shall say hereafter. The Congress declared a policy in that act, and it declared first——

> 'The Congress hereby declares that it is imperative to increase and train the personnel of the *armed forces* of the United States * * *' "

* * * *

"What are we going to do about advice as to operating and maintaining *an army* * * * are we going to take the sound, deliberate, and well considered judgment of the Chief of Staff or the United States Army, a professional soldier, who knows what we have and what we have not, who knows the defects, who knows the virtues and the power that he has * * *"

* * * *

"*When I want a soldier to fight,* I want one that has been trained the length of time necessary to enable him to understand the difficulties of the operation of mechanized units here or a difficult piece of machinery there. *I want*

a soldier who is seasoned and hardened and toughened until he can march all day and *fight* all night if it is necessary. I do not want a molly coddle that is too fat and too heavy to move with action swift and prompt when the time comes; *I want a trained soldier* and I want him equipped. *This is the meaning of this legislation*—that we shall train them until they are equipped. *Are we going to march raw recruits, like we did during the World War, to a battle-front for training. Or are we going to train them here* in our own homeland in the great cantonments which we have built, *so they may be prepared when they are called to go—trained in peacetime,* instead of before an oncoming, ruthless mechanized foe in the powerful striking force?"

RESUME OF THE LEGISLATIVE HISTORY OF THE EXTENSION OF SERVICE ACT OF DECEMBER 13, 1941

Note: Citations are of similar scope to those given in Appendix A in connection with Extension of Service Act of August 18, 1941. All page references are, unless otherwise specified, to Congressional Record, 77th Congress, First Session, Volume 87, Part 9.

Senate

Dec. 9, 1941 — Proposed joint resolution, as drafted by War Department, received by Senate (pp. 9544-9545).

Dec. 9, 1941 — Senator Reynolds introduced such proposed joint resolution as S. J. Res. 117, which was thereupon referred to Committee on Military Affairs.

Dec. 10, 1941 — S. J. Res. 117 reported by Committee on Military Affairs with amendments (p. 9601). See S. Rept. No. 888 of Dec. 10, 1941.

Dec. 10, 1941 — S. J. Res. 117, as reported with amendments, debated (pp. 9601-9605).

Dec. 11, 1941 — S. J. Res. 117, as reported with amendments, printed in record and passed by Senate (pp. 9653-9654).

House of Representatives

Dec. 10, 1941 — Rep. May introduced H. R. 6195, which was referred to Committee on Military Affairs (p. 9598).

Dec. 10, 1941 — H. R. 6195 reported back by Committee on Military Affairs without amendment (See H. Rept. No. 149), and referred to Committee of whole House (p. 9649).

Dec. 11, 1941	H. R. 6195 laid on table and House, without debate, passed S. J. Res. 117 in lieu thereof (p. 9673).
Dec. 13, 1941	Approved and signed by President. Public Res. 338 (p. 9751).

An examination of the foregoing legislative history leads inevitably to the same conclusions as stated at pages 4 and 5 of this petition, and requoted at pages iv and v of Appendix A.

Accordingly, in Appendix D the following excerpts have been made from the legislative history of the Extension of Service Act of December 13, 1941, at the pages indicated:

pp. xxvii-xxix—Excerpts from statement of Senator Reynolds, Chairman of the Senate Committee on Military Affairs, in connection with Senate Joint Res. 117.

pp. xxix—Excerpt from Report of the Committee on Military Affairs, Senate Report No. 888, to accompany S. J. Res. 117, Dec. 10, 1941.

It will be noted from the statement of Senator Reynolds that S. J. Res. 117 originated with a proposed joint resolution *prepared by the War Department* and quoted at page xxviii of Appendix D. In such suggested joint resolution drafted by the War Department, it will be noted that the request for extension of service is expressly confined solely to those "subject *to active military service*". It will further be noted that all Senator Reynolds' references are solely to the extension of service of "members of our Armed Forces

and those who are to be inducted into the Armed Forces". Again, nowhere is there the slightest reference to conscientious objectors.

This is also true of the brief debate in the Senate on December 10, 1941. There was no debate in the House, and no reported hearings before the respective Committees on Military Affairs of either the House or the Senate.

Finally, it will be noted that this legislation was requested by the War Department and introduced in the Senate the day following Pearl Harbor, and introduced into the House the day thereafter, as emergency legislation relating solely to the extension of service of those "subject *to active military service*" and was so enacted. (See Appendix E, p. xxxv.) There cannot be, therefore, the slightest excuse for concluding that there was any intention upon the part of Congress in enacting this legislation thereby to extend the service of conscientious objectors, such as petitioner, *who never were or could be in or subject to any military service whatever, active or otherwise.* Such conscientious objectors since found conscientiously opposed even to non-combatant service, by the express provisions of Section 5 (g) of the Selective Training and Service Act of 1940, could only be *"assigned* to work of national importance *under civilian direction"*.

EXCERPTS FROM STATEMENT OF SENATOR REYNOLDS, CHAIRMAN OF THE COMMITTEE ON MILITARY AFFAIRS OF THE SENATE IN CONNECTION WITH SENATE JOINT RES. 117. (CONGRESSIONAL RECORD, 77TH CONGRESS, FIRST SESSION, VOLUME 87, PART 9, pp. 9544 and 9545, and pp. 9601 and 9602)

(Pages 9544-9545)

"REMOVAL OF RESTRICTIONS ON SERVICE OF *ARMED FORCES.*"

"MR. REYNOLDS. Mr. President, the War Department has requested that we give immediate consideration—that is, this afternoon—to its request that the Government be permitted to send *our armed forces* outside the Western Hemisphere, which up to the present time has been prohibited, and that the *members of our armed forces and those who are to be inducted into the armed forces of the United States* be retained for a period of six months after the termination of the present emergency or emergencies to follow. Therefore I ask that the joint resolution prepared by the War Department,* which I now introduce, be read at the desk.

THE PRESIDENT pro tempore. Without objection, the joint resolution will be read.

The joint resolution (S. J. Res. 117) removing restrictions on the use, and terms of service, of units and members

*Inquiry by counsel to the Clerk of the Senate Committee on Military Affairs develops that the Committee has no record that any letter or other written communication was received from the War Department in connection with such joint resolution prepared by it.

of the Army of the United States, was read the first time by its title, and the second time at length, as follows:

> "Resolved, etc., That the provisions of Public Resolution No. 96, Seventy-sixth Congress, approved August 27, 1940, and of the Selective Training and Service Act of 1940, as amended, insofar as they restrict the territorial use of units and personnel *of the Army of the United States, including selective trainees,* are suspended during the existence of the present or any future war in which the United States is engaged, and for 6 months thereafter. Sec. 2. The periods of appointment, enlistment, *induction and service of all members of the Army of the United States, including selective trainees,* now or hereafter *in or subject to active military service* of the United States, are extended for the period stated in the preceding section"

* * * *

(Pages 9601-9602)

"Likewise the joint resolution (S. J. Res. 117) provides for the 'freezing the enlistment period of the men *now in the armed forces and those who may serve in the future* so as to cover the period of the present war and duration thereafter of 6 months. The purpose is to give the Army authorities an opportunity to liquidate, disband and discharge the members *of the armed forces.*' "

* * * *

Senator Reynolds then stated that the definition of Army of the United States was amended to make clear it includes persons *inducted into* the land forces of the United States under Selective Service and Training Act of 1940.

Senator Lodge stated that up to this amendment *selectees* were not members of Army.

(For amended definition see excerpt from report of Committee on Military Affairs—Senate Report No. 888; to accompany S. J. Res. 117, which follows)

EXCERPT FROM REPORT OF THE SENATE COMMITTEE ON MILITARY AFFAIRS—SENATE REPORT NO. 888; TO ACCOMPANY S. J. RES. 117 (Dec. 10, 1941)

* * * *

"Section 2 extends the period of service during wartime, and for 6 months thereafter, *of persons in the Army of the United States.* In other words, it freezes them in for the duration of the war, and for an additional 6 months to provide for terminating their service in an orderly manner. Similar legislation has already been passed by the Senate with respect to persons in the naval service.

Section 3 amends the definition of the Army of the United States which is now contained in section 1 of the National Defense Act of June 3, 1916, as amended, so as to make it clear that persons heretofore or hereafter *inducted* into the land forces of the United States under the Selective Training and Service Act of 1940 *are members of the Army of the United States.* As some question has been raised about this matter, it is deemed advisable to clarify it at this time."

SELECTIVE SERVICE AND TRAINING ACT OF 1940, AS AMENDED

(54 Statutes 885; 50 U. S. C. App. 303 (a), (b), 305 (g))

* * * *

"3 (a) Except as otherwise provided in this Act, every male citizen of the United States, and every male person residing in the United States, who is between the ages of eighteen and forty-five at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States. * * *

3 (b) Each man inducted under the provisions of subsection (a) shall serve for a training and service period of twelve consecutive months, unless sooner discharged, except that whenever the Congress has declared that the national interest is imperiled, such twelve-month period may be extended by the President to such time as may be necessary in the interests of national defense.

* * * *

5 (g) Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction. * * *"

SERVICE EXTENSION ACT OF 1941

(Public Law 213, 1941, approved Aug. 18, 1941; 55 Statutes 626; 50 U. S. C. App. Sec. 351, 352)

"The Congress, acting in accordance with and solely for the purpose of carrying into effect the provisions of section 3 (b) of the Selective Training and Service Act of 1940 hereby declares that the national interest is imperiled.

Sec. 2. The President is hereby authorized, subject, however, to the condition hereinafter stated, to extend, for such periods of time as may be necessary in the interests of national defense, the periods of service, training and service, enlistment, appointment, or commission, of any or all persons inducted for training and service under said Act, members and units of the reserve components of the Army of the United States (including the National Guard of the United States), retired personnel and enlisted men of the Regular Army, and any other members of the Army, who are now, or who may hereafter be, in or subject to active military service, or training and service: *Provided,* That extension of the periods of active military service, or training and service, in the case of any person subject to the provisions of this section, shall not, without his consent, exceed eighteen months in the aggregate; except that whenever the Congress declares that it is in the interests of national defense to further extend such periods of active military service and training and service, such periods may be further extended by the President, in the case of any such persons, for such time as may be necessary in the interests of national defense: *Provided further,* that the authority hereby conferred is subject to the condition that the delegation of such authority may be revoked at any time by concurrent resolution of the Congress."

TERRITORIAL USE OF ARMY AND EXTENSION OF SERVICE PERIOD

(Public Law 338, 1941, approved December 13, 1941; 55 Statutes 799; 50 U. S. C. App. Sec. 731, 732)

"The provisions of Public Resolution Numbered 96, Seventh-sixth Congress, approved August 27, 1940, as amended, and of Public, Numbered 783, Seventy-Sixth Congress (the Selective Training and Service Act of 1940), as amended, insofar as they restrict the territorial use of units and members of the Army of the United States, are suspended during the existence of any war in which the United States is engaged, and during the six months immediately following the termination of any such war. Dec. 13, 1941, c. 571, § 1, 55 Stat. 799.

Sec. 2. The periods of service, training and service, enlistment, appointment, or commission, of all members of the Army of the United States now or hereafter in or subject to active military service of the United States are extended for the period stated in the preceding section: *Provided,* that nothing in this section shall be construed to prevent the President from terminating such periods of service, training and service, enlistment, appointment, or commission at an earlier date in any case." Dec. 13, 1941, c. 571, § 2, 55 Stat. 800.

Sec. 3. Section 1 of the National Defense Act of June 3, 1916, as amended (section 2 of Title 10), is amended by striking out the period at the end thereof and inserting in lieu of such period a comma and the following: "and shall include persons inducted into the land forces of the United States under Public, Numbered 783, Seventh-sixth Congress (the Selective Training and Service Act of 1940), as amended." Dec. 13, 1941, c. 571, § 3, 55 Stat. 800.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 342

DANIEL BIRMELI DINGMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION BY PETITIONER FOR LEAVE TO FILE A SECOND PETITION FOR REHEARING

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January 22, 1947.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

DANIEL BIRMELI DINGMAN, *Petitioner,* *vs.* UNITED STATES OF AMERICA, *Respondent.*	No. 342

MOTION BY PETITIONER FOR LEAVE TO FILE A SECOND PETITION FOR REHEARING

Petitioner, Daniel Birmeli Dingman, respectfully moves the Court that an order be entered granting petitioner leave to file forthwith the accompanying second petition for rehearing of the Court's order of October 14, 1946, which order denied the petition for a writ of certiorari herein.

The grounds for said motion are the following:

1. The first petition for rehearing herein was filed December 18, 1946* and denied by the Court's order of December 23, 1946.

2. On December 23, 1946, the Court handed down its unanimous decisions in the cases of *Gibson* v. *United States* and *Dodez* v. *United States,* Nos. 23 and 86, October Term, 1946.

*Time for the filing of such petition for rehearing was extended by the orders of the Court, respectively, of October 28, 1946 and December 4, 1946.

3. For the reasons stated in the accompanying second petition for rehearing, petitioner believes that it will appear that, in view of the decisions in the *Gibson* and *Dodez* cases, it could not be otherwise than arbitrary and capricious, to continue to deny petitioner certiorari herein.

4. For the reasons stated in such second petition for rehearing, petitioner believes it will appear that the summary disposition of the first petition for rehearing was not justified, and that such petition should now have the further and more mature consideration of the Court.

Respectfully submitted,

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January 22, 1947.

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IN THE

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OCTOBER TERM—1946

No. 342.

DANIEL BIRMELI DINGMAN,
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v.

UNITED STATES OF AMERICA,
Respondent.

SECOND PETITION FOR REHEARING

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January 17, 1947.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1946

DANIEL BIRMELI DINGMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

No. 342.

SECOND PETITION FOR REHEARING

Petitioner's first petition for rehearing was filed December 18, 1946.* It was denied December 23, 1946. On the very day of its denial, this Court handed down its unanimous decisions in the cases of *Gibson* v. *United States,* and *Dodez* v. *United States,* Nos. 23 and 86, October Term, 1946. Petitioner now files his second petition for rehearing based on the following grounds.

I.

IN VIEW OF THE RECENT DECISIONS OF THIS COURT IN THE *GIBSON* AND *DODEZ* CASES, IT CANNOT BE OTHERWISE THAN ARBITRARY AND CAPRICIOUS TO CONTINUE TO DENY PETITIONER CERTIORARI HEREIN.

The *Gibson* and *Dodez* decisions clearly establish that conscientious objectors who have not been "actually in-

*Though counsel, at the time of filing the first petition for rehearing was not so advised, petitioner was released on parole on November 25, 1946.

ducted" even for non-combatant service, but who, like petitioner, have merely been "assigned to work of national importance under civilian direction", are not in military service of any nature whatever, but remain purely civilians in civilian service.

Nevertheless, this Court has declined in this case to issue certiorari to determine whether, as such a civilian conscientious objector, petitioner's period of assignment "to work of national importance under civilian direction" has been extended by the Extension of Service Acts of August 18 and December 13, 1941, beyond the twelve month period originally provided by the Selective Training and Service Act of 1940, even though it seems beyond question that both by their express terms and Congressional intent, such Extension Acts apply only to persons actually "in or subject to *active military service*."

In the *Gibson* and *Dodez* cases, this Court, as shown in its opinion, issued certiorari "because of the importance of the question presented for the administration of the Act."

In those cases, the petitioners claimed the right to be classified as ordained ministers of religion, and as such to be wholly exempted from training and service. They had, however, been classified as conscientious objectors opposed to non-combatant service and, as such, had been assigned "to work of national importance under civilian direction." The basic question presented was whether they could raise the question of mis-classification as a defense in a criminal trial in the one instance for refusing to report to, and in the other for immediately leaving, a conscientious objector camp, or could only raise such question of mis-classification by *habeas corpus*. The questions as to when petitioners had exhausted their administrative remedies were only incidental to this basic question.

Important as were both the basic and incidental questions in the *Gibson* and *Dodez* cases, they obviously have application only to a very limited class. Moreover, they were essentially procedural even though their determination involved the broad question whether the status of such conscientious objectors was military or civilian.

Here, on the contrary, the basic questions presented extend to a very large class of conscientious objectors. They extend not only to the criminal liability of numerous conscientious objectors who have, like petitioner, after more than twelve months of service, left conscientious objector camps allegedly without authority, but also to the civil authority to require several thousand conscientious objectors to remain in such camps after more than twelve months of service.

Moreover, the issuance of certiorari for the determination of the basic questions here presented, becomes particularly appropriate for two reasons.

First, because of the doubts expressed by the Court in the *Gibson* and *Dodez* cases, as to whether relief by way of *habeas corpus* would be available to determine the validity of the assignment of conscientious objectors "to work of national importance" under civilian direction, unless, in addition to such mere assignment, such conscientious objectors should, like petitioner, be under penal detention.

Second, the determination of the basic questions here presented would unquestionably minimize the burden upon the recently created "President's Amnesty Board", of which the Honorable Owen J. Roberts, former Associate Justice of this Court, is Chairman. As this Court is undoubtedly aware, that Board has been created to examine the cases of all persons convicted under the Selective Train-

ing and Service Act of 1940 and to recommend those persons it deems deserving of executive clemency. A large proportion of persons so convicted have, like petitioner, been convicted for leaving conscientious objector camps after more than twelve months of service. If petitioner's basic contentions be here sustained, he and such other conscientious objectors would require no consideration by such Board for executive clemency, since their convictions would be without warrant in law.

It would seem clear, therefore, that the questions here presented are not only of equal, but greater importance "for the administration of the Act" than those which this Court considered warranted the issuance of certiorari in the *Gibson* and *Dodez* cases. It is, therefore, respectfully submitted that to continue here to deny certiorari for the determination of such questions, would, in view of the *Gibson* and *Dodez* cases, be arbitrary and capricious.

II.

THE SUMMARY DISPOSITION OF THE FIRST PETITION FOR REHEARING WAS NOT JUSTIFIED.

It seems clear that this Court could not have based its denial of the first petition for rehearing herein on any informed conclusion as to the merits of petitioner's basic contentions in that petition.* These basic contentions are

*The Court's order denying the first petition for rehearing herein was entered five days after the filing of such petition. That petition included specific citations to several hundred pages of the Congressional Record, covering debates in the Senate and House in connection with the Extension of Service Acts of August 18 and December 13, 1941. It also included specific citations to several hundred pages of Committee hearings and reports.

that the legislative history of the Extension of Service Acts of August 18 and December 13, 1941 conclusively demonstrates that the Congress had no intention whatever that the extensions of service there provided should apply to conscientious objectors who, like petitioner, have never been "in or subject to active military service," and further demonstrates that the express language of those Acts limiting the extensions of service there provided to persons "in or subject to *active military service*" was therefore intentionally used.

Since the Government had not challenged these contentions and since this Court obviously did not take the time necessary to determine the factual justification for them, it can only be assumed that the Court considered such Congressional intent in the use of such expressly limiting language in the Extension of Service Acts to be irrelevant. Such Congressional intent, however, could only be irrelevant* if the Court should construe the twelve month limitation of

*There is one other basis on which it might possibly be contended that it would be irrelevant here to prove that Congress intentionally used the express language of the Extension of Service Acts limiting their application to persons "in or subject to active military service". This would be on the theory that this would not amount to affirmative proof that Congress expressly intended to exclude from like extensions of service, conscientious objectors such as petitioner, who never were in or subject to active military service, and, therefore, that it should be assumed that the use of such limiting language was in this respect a mere oversight. It should suffice to say, (a) that the legislative history set out in the first petition for rehearing affords no basis whatever for any such assumption, (b) that such assumption would amount to judicial legislation, and (c) that such an assumption could not be justified as the basis for the imposition of criminal liability. Counsel feel justified in stating, however, that good ground exists for believing that it is, nevertheless, on the basis of such an assumption that the Government has opposed certiorari in this case.

service provided by Section 3(b) of the Selective Training and Service Act of 1940, as not applying to conscientious objectors who, like petitioner, have merely been assigned to work of national importance under civilian direction, but as applying only to persons who have been "actually inducted" for training and service, including conscientious objectors inducted for non-combatant service.

In addition to the objections to such a construction of Section 3(b) pointed out at page 3 of petitioner's Reply to the Brief in Opposition, petitioner desires to call the Court's attention to the fact that such construction of Section 3(b) would be opposed to the administrative construction placed upon that section, both by the Director of the Selective Service in the practical administration of that Act, and by the Government in these proceedings.

That the Director of Selective Service has administratively construed the twelve month limitation of service provided by Section 3(b) as applying to conscientious objectors assigned to work of national importance under civilian direction, is avowed by the Government itself in its Brief in Opposition, pages 8 and 9. There quotation is made from the First Report of the Director of Selective Service, 1940-41, *Selective Service in Peacetime*, (1942), p. 200. As there quoted, and as also quoted p. 12 of the petition for certiorari, the Director of Selective Service said

> "In keeping with the original Selective Service Act, it was expected that assignees would serve one year in camp and then be released. However, congressional action extended the term of service for men in the Army. It was interpreted to apply to assignees as well, so that their term of duty was increased to 18 months. . . ."

It is therefore clear that, although the twelve months limitation of service provided by Section 3(b) of the 1940

Act does not in express terms apply to conscientious objectors such as petitioner who have not been "actually inducted" for training and service but have merely been assigned to work of national importance under civilian direction, that section has been administratively construed so to apply. It is further clear that Selective Service Regulation 652.14, for violation of which petitioner has been convicted, in purporting to extend the period of assignment of such conscientious objectors beyond such twelve month period, was necessarily based on the assumption that the Extension of Service Acts of August 18 and December 13, 1941, were intended by the Congress to apply to such conscientious objectors.

It would therefore appear that the question whether Congress intentionally used the language expressly limiting the application of such Extension of Service Acts solely to persons "in or subject to active military service" could not here be irrelevant, and that this Court, therefore, should now give mature consideration to the legislative history of those Acts in this respect, as set out in the first petition for rehearing herein.

Petitioner accordingly respectfully petitions this Court for reconsideration of its denial of certiorari herein, and prays that such writ shall now issue and that in due course thereafter, petitioner's conviction be reversed and set aside.

Respectfully submitted,

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January 17, 1947.